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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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ANTHONY RASHAD GEORGE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

On Petition for Discretionary Review from the
Fifth District Court of Appeals, Cause No. 05-18-00941-CR
Affirming Judgment from the 282nd Judicial District Court of
Dallas County, Trial Cause No. F16-76714-S

STATE'S BRIEF

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The State requests oral argument only if Appellant argues.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas submits this brief in response to the brief of Appellant, Anthony Rashad George.

STATEMENT OF THE CASE

Appellant and his three accomplices—Rodney Range, Jessica Ontiveros, and Rachel Burden—were charged with capital murder for murdering Brian Sample in the course of committing or attempting to commit robbery. (CR 10, 18, 149, 151-52; 7 RR 242; 8 RR 263; 9 RR 10, 162). *See* Tex. Penal Code Ann. § 19.03(a)(2). Appellant pleaded not guilty and proceeded to trial before a jury.[1] (CR 140; 7 RR 243). After hearing all of the evidence, the jury was instructed that it could convict Appellant of capital murder on any of these bases: (1) as the principal actor; (2) as a party to the offense; or (3) as a party-conspirator. (CR 147-48, 151-52). The jury charge also contained instructions on the lesser-included offenses of murder and manslaughter. (CR 152-53). On July 27, 2018, the jury returned a general verdict of guilty for capital murder, and the trial court assessed the mandatory sentence of life imprisonment without parole. (CR 9, 140, 157; 10 RR 296-98). *See* Tex. Penal Code Ann. § 12.31(a)(2).

Appellant appealed his conviction, asserting that the trial court erred by denying his request for a jury instruction on the lesser-included offense of robbery.

[1] Prior to trial, Appellant rejected the State's plea bargain offer of twenty years' imprisonment in exchange for a plea of guilty to a lesser-included offense. (CR 5; 5 RR 5-8).

The Fifth District Court of Appeals overruled this complaint, holding that Appellant was not entitled to the requested instruction. *See George v. State*, 05-18-00941-CR, 2019 WL 5781917, at *6 (Tex. App.—Dallas Nov. 6, 2019, pet. granted) (mem. op., not designated for publication).[2] The appellate court explained that the jury was instructed on a conspiracy theory of liability for murder in the course of robbery, and because there was no evidence in the record showing that the victim's death was not or should not have been anticipated, Appellant had not met the second prong of the lesser-included offense test. *See id.* In support of its holding, the court noted: "To the contrary, when one decides to steal property from another, he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation." *Id.* (citing *Allen v. State*, No. 05-03-00196-CR, 2004 WL 1637885, at *7 (Tex. App.—Dallas July 23, 2004, no pet.) (not designated for publication); *Moore v. State*, 24 S.W.3d 444, 447 (Tex. App.—Texarkana 2000, pet. ref'd)). Appellant filed the instant petition for discretionary review challenging the appellate court's resolution of this issue.

ISSUE PRESENTED

Did the Fifth District Court of Appeals err by holding that Appellant was not entitled to a jury instruction on the lesser-included offense of robbery because there

[2] In his appeal, Appellant also challenged the legal sufficiency of the evidence supporting his conviction for capital murder and complained about two alleged instances of improper jury argument by the State. The appellate court overruled those issues, modified the judgment to correct clerical errors contained therein, and affirmed the trial court's judgment as modified. *See id.* at *3-5, *7-10.

was no evidence in the record showing that the victim's death was not or should not have been anticipated?

STATEMENT OF FACTS

On November 27, 2016, Brian Sample was robbed and murdered in his room at the Le Meridien Hotel in Dallas, Texas. (7 RR 254-255, 273; 8 RR 14, 19, 39). Sample's body was discovered by housekeeping around 5:30 p.m., unclothed, hunched over the hotel bed, and bound at the wrists and ankles with zip ties. (7 RR 279; 8 RR 16, 48, 188; 10 RR 56). The "Do Not Disturb" sign was on the door, the television was at full volume, and the room was in disarray. (7 RR 276, 279; 8 RR 16, 91; 10 RR 56). Three or four days prior to the murder, Sample had received a large insurance settlement check. (7 RR 250-51). When hotel staff assisted the police in opening the safe in Sample's hotel room, they found $17,700 in cash inside. (10 RR 73-74).

An autopsy performed the day after the murder revealed that Sample had numerous injuries on his body consistent with blunt force trauma. (8 RR 137-38, 144-45, 149; State's Exhibits ("SE") 9, 87-90, 92-116). His body bore multiple abrasions and contusions, including bruising over his upper and lower eyelids and along his left cheek. (8 RR 144-45, 147, 154; SE 9, 93, 106-07). The bruising indicated some sort of blunt object or impact to the skin. (8 RR 149). He had multiple bruises and cuts inside his mouth, one of which tore all the way through the left side of his lip and into the lower part of his left cheek. (8 RR 148, 165-67; SE 9, 104-05). The impact to his mouth also resulted in a broken tooth. (8 RR 144, 148, 167). A bone in Sample's skull,

located underneath the deepest cut on the left side of his forehead, was chipped. (8 RR 144-45, 162-64; SE 99-103). There were hemorrhages inside his eye lids and pinpoint hemorrhages along his interior neck and on his chest, injuries consistent with an "asphyxial component." (8 RR 145, 148, 150-51, 154-56, 158-62; SE 88, 93-98). The medical examiner concluded that Sample died as a result of homicidal violence, including asphyxia and blunt force injuries, and that the manner of death was homicide. (8 RR 175, 178; SE 87).

Footage from the hotel's security cameras reflected that Sample was last seen alive on the day of the offense around 2:15 p.m. with two female escorts, Jessica Ontiveros and Rachel Burden. (8 RR 72-73, 77, 229-33; 10 RR 82; SE 172). Ontiveros met Appellant when she was twenty years old while working as a stripper and escort in Dallas. (8 RR 204, 206, 269). Ontiveros and Appellant began dating, and she moved in with him a few months later. (8 RR 205). Ontiveros continued to work as an escort while she was dating Appellant, and he would occasionally drive her to meet her dates. (8 RR 207). Ontiveros gave all the money she earned to Appellant, and he paid the bills. (8 RR 208, 251). Ontiveros met fellow escort Rachel Burden, who went by the name "Cali," through Appellant. (8 RR 208-09).

Burden was working as an escort in Atlanta, Georgia when she met Appellant through the social media website Instagram. (9 RR 84-85, 87). In October 2016, after communicating with Appellant on Instagram for almost a year, Burden decided to come to Dallas to work with Appellant as her pimp. (9 RR 86-88). Burden had

previously been assaulted by two clients, so she desired the protection that Appellant promised her. (9 RR 87-88). Appellant, to whom she referred as "Papi" or "Daddy," assisted Burden in finding clients by posting ads for her services online. (9 RR 92-93, 94-95, 96). Burden knew that Appellant had Ontiveros working for him as well. (9 RR 92). Like Ontiveros, Burden gave all the money she earned to Appellant. (9 RR 92, 98). Appellant sometimes searched Burden's belongings to make sure she was not hiding any money from him. (9 RR 98-99). After Burden had been working in Dallas for a few weeks, she and Ontiveros became friendly and began communicating with each other on social media and via text message. (8 RR 209; 9 RR 92-93). They would occasionally do dates together because it generated more money. (9 RR 100-01).

Ontiveros met Sample online and scheduled a date with him at the Le Meridien Hotel the morning of the offense. (8 RR 209-12, 271). When Ontiveros arrived at Sample's hotel room, he appeared to be intoxicated. (8 RR 210, 212-13). After Ontiveros had been at the date for a short time, Sample requested an additional girl, so she called Burden. (8 RR 211, 274-76; 9 RR 100-01). Appellant picked up Burden and took her to the hotel to join Ontiveros and Sample. (9 RR 100-01). Sample and Ontiveros met Burden downstairs and then the three of them went up to the room together. (8 RR 213; 9 RR 101-02). Burden and Ontiveros did some drugs with Sample and spent a little over an hour with him. (8 RR 212, 277; 9 RR 103, 105-06). Sample offered to let Burden have his hotel room later that evening, so they exchanged numbers before she left. (9 RR 104). At the conclusion of the date,

Ontiveros went to another appointment, and Appellant picked up Burden from the hotel. (8 RR 213; 9 RR 104). During the drive, Burden told Appellant that Sample had paid them in all $100 bills that he retrieved from the closet where the safe was located. (9 RR 102-03, 106).

A short time later, Sample sent Burden a text asking if she and Ontiveros could come back. (8 RR 213-14, 280; 9 RR 106-07, 111). Ontiveros was on another date, so Burden planned to go alone until Ontiveros could join them. (8 RR 213-14, 280; 9 RR 111-12). Appellant drove Burden back to the hotel to meet Sample. (9 RR 112). Sample and Burden got high and talked while they waited for Ontiveros to arrive. (9 RR 113). Once Ontiveros notified Burden she was on her way in an Uber, Sample and Burden met her downstairs and then the three of them went back up to the room together. (8 RR 214; 9 RR 115). During this second date, Sample was intoxicated, but Burden thought he was "manageable." (9 RR 116). At the end of the date, Sample gave Burden his room key so she could come back later to use the room after he had left the hotel. (9 RR 117). Appellant picked up both girls and they drove to his and Ontiveros's apartment. (9 RR 117-18). During the drive, Burden told Ontiveros and Appellant that Sample had more money and they should go back. (8 RR 235, 243).

Sample contacted Burden again a short time later and requested that she and Ontiveros come back for a third date. (9 RR 119). Ontiveros and Burden met Sample downstairs, and the three of them went up to his room together. (8 RR 77, 231-33; 9 RR 120; 10 RR 82; SE 176-78). During the third date, Sample was acting more erratic

and paranoid. (8 RR 215, 281; 9 RR 120, 183). He told Ontiveros and Burden to stop talking to each other and stop touching their phones. (9 RR 120). He also moved a piece of furniture in front of the door to prevent them from leaving or anyone else from entering. (8 RR 215-16, 282; 9 RR 120). Burden told Sample she needed to make a call and had him remove the barrier from the door so she could step out of the room. (8 RR 216, 281; 9 RR 120-21, 186-87). Burden never returned to the room. (8 RR 217).

As Burden was leaving, Appellant was entering the hotel to execute their plan to rob Sample. (8 RR 82-83, 121; 9 RR 150, 183; 10 RR 40, 86). Appellant had changed into all black clothing and was wearing gloves. (8 RR 79; 9 RR 133, 144-45). He was accompanied by his friend Rodney Range, who was dressed in red. (8 RR 79; 10 RR 82). Burden met up with Appellant outside the hotel, and after she gave him the money she had made from the date, he instructed her to walk up the street. (8 RR 82; 9 RR 121). She complied and sent Appellant a text message warning him to "be careful." (9 RR 122, 146, 148, 150; 10 RR 40). She then sent Ontiveros a text letting her know that Appellant and Range were on their way up to the room. (8 RR 220). She also suggested to Ontiveros and Appellant that they look for money in the closet and that they take the phone cords from the room so that Sample could not call anyone for help. (9 RR 122, 148; 10 RR 41).

A few minutes later, Appellant and Range entered Sample's hotel room wearing black gloves. (8 RR 217, 244, 257). Appellant directed Ontiveros to sit on the couch.

(8 RR 241-43). Sample yelled at the intruders and came towards them. (8 RR 217-18, 242, 259-60). Range and Appellant pushed Sample off and then began hitting him repeatedly. (8 RR 217-18, 242, 244, 255-56, 258-60). Sample fought back, and it took the strength of both Range and Appellant to get Sample under control.[3] (8 RR 236-37, 258). Range put Sample in a choke hold until he lost consciousness and then bound Sample's wrists and ankles with zip ties. (8 RR 218, 258, 283-84). As a result of the struggle, Sample's blood was all over the hotel room. (8 RR 244, 247). Sample was lying face-down on the bed in a pool of blood, unconscious, as the men tossed the room. (8 RR 218, 220-22). They tried but were unable to open the safe, so they took Sample's watch and cell phone and left.[4] (8 RR 221-22, 250). Appellant ordered Ontiveros to stay in the room a short time before she left. (8 RR 222).

Burden met up with Appellant and Range as they exited the hotel. (8 RR 83; 9 RR 124, 146). As Burden and Appellant walked on the east side of the hotel toward Appellant's car, Appellant tossed Sample's cell phone in the sewer drain. (10 RR 74, 76-77). Once they got into Appellant's car, Burden noticed that Appellant had blood on his face but had no visible injuries. (9 RR 125-26; 10 RR 42).

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[3] At trial, Ontiveros initially testified that Appellant was "just standing there" trying to calm her down while Range beat Sample. (8 RR 218, 249). She was then impeached with her prior statements to the police indicating that Appellant attacked Sample, was pushing and "swinging on" him, and helped get Sample under control before Range put him in a choke hold. (8 RR 236-37, 241-45, 256, 258).

[4] The hotel's security footage reflected that Range and Appellant were in the hotel during the commission of the offense for approximately seventeen minutes. (10 RR 87).

Ontiveros exited the hotel about ten minutes later and got into the car with Appellant and Burden. (8 RR 223). When she left the room, Sample was still lying face-down on the bed, unconscious. (8 RR 222). The three of them drove to Appellant and Ontiveros's apartment, and Range came over a short time later. (9 RR 127). While Burden and Ontiveros were upstairs, Burden could hear Appellant and Range downstairs talking about the watch they had stolen from Sample. (9 RR 127-28). A few days after the murder, Appellant and Burden fled to Las Vegas. (9 RR 129). Ontiveros met them shortly thereafter. (8 RR 225-26, 294, 300-01; 9 RR 129).

Dallas Police Detective Derick Chaney was the lead detective assigned to investigate Sample's murder. (10 RR 54). When he arrived at the scene, it was apparent to him that a physical altercation had occurred in Sample's hotel room and that the room had been tossed. (10 RR 59-60). The blood spatter on the headboard, wall, and pillows was consistent with Sample being hit multiple times while bleeding. (10 RR 61-62). Detective Chaney also observed that Sample's ankles and wrists were bound tightly and in such a way that he could not have done it himself. (10 RR 62-63).

The police obtained and reviewed the footage from the hotel's security cameras. (10 RR 79-92; SE 81, 159-80, 182-204). After reviewing the footage, officers searched the sewer drain on the east side of the hotel and located Sample's cell phone inside. (10 RR 74, 76-77). The police also recovered latent prints inside the hotel room, which were processed and identified as the prints of Ontiveros and Burden. (10 RR 93). With the help of the U.S. Marshal Fugitive Task Force, Ontiveros, Burden,

and Appellant were located in Las Vegas and subsequently arrested. (8 RR 225-26; 9 RR 17-28, 35-37, 53-59, 65-68; 10 RR 92-93). When Ontiveros was interviewed regarding the offense, she told the police that they would find Sample's watch in a jewelry box in Appellant's closet at their apartment. (8 RR 254-55).

Appellant presented no evidence at trial, instead resting on the presumption of his innocence. (10 RR 222, 241). The trial court denied Appellant's request for jury instructions on self-defense and the lesser-included offenses of robbery and theft, but included instructions on the lesser-included offenses of murder and manslaughter. (CR 144-56; 10 RR 223-24, 227-28, 231-32, 236-37, 249-52). The jury found Appellant guilty of capital murder. (CR 9, 140, 157; 10 RR 296-97).

SUMMARY OF THE ARGUMENT

The issue before the appellate court in this case was whether the trial court erred in denying Appellant's request for a lesser-included offense instruction on robbery. The Fifth Court of Appeals carefully analyzed the facts of the case and relied on well-settled precedent from this Court in resolving this issue against Appellant. Appellant argues that this holding conflicts with that of two other appellate courts; however, one of the cases cited by Appellant has no precedential value, and both cases are factually distinguishable from the instant case.

ARGUMENT

THE FIFTH COURT OF APPEALS CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF ROBBERY.

Appellant argued on appeal that the trial court erred by denying his request to submit a jury instruction on the lesser-included offense of robbery. *See George*, 2019 WL 5781917, at *6. The appellate court relied on well-settled precedent from this Court, applied to the particular facts of this case, in resolving this issue against Appellant. *See id.* (*citing Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001)). As such, the sole issue raised by Appellant on discretionary review is without merit and should be overruled.

Applicable Law

As correctly noted by the appellate court, Texas courts apply a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *See Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012); *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993) (en banc). First, the court determines if the proof necessary to establish the charged offense also includes the lesser offense. *Cavazos,* 382 S.W.3d at 382. This determination is a question of law, and it does not depend on the evidence to be produced at the trial. *Id.*

Under the second step, the reviewing court considers whether there is some evidence that would permit a rational jury to find that, if the defendant is guilty, he is

guilty only of the lesser offense. *Cavazos*, 382 S.W.3d at 383. This determination is a question of fact and based on the evidence presented at trial. *Id.* A defendant is entitled to an instruction on a lesser-included offense if some evidence from any source raises a fact issue on whether he is guilty of only the lesser offense, regardless of whether the evidence is weak, impeached, or contradicted. *Id.*

When a jury is instructed on a conspiracy theory of liability for murder in the course of a robbery, the second prong of the lesser-included offense test is met only if there is evidence in the record showing: (1) there was no murder; (2) the murder was not committed in furtherance of a conspiracy; or (3) the murder should not have been anticipated. *Solomon*, 49 S.W.3d at 369.

The appellate court properly applied this Court's precedent in deciding that Appellant was not entitled to the requested instruction.

The appellate court held that Appellant met the first prong of the lesser-included offense test because robbery is a lesser-included offense of murder in the course of robbery. *See George*, 2019 WL 5781917, at *6 (citing *Solomon*, 49 S.W.3d at 369). The court held, however, that Appellant failed to meet the second prong. *See id.*

As noted by the appellate court, the jury in Appellant's case was instructed on a conspiracy theory of liability for murder in the course of a robbery. (CR 147-48, 151-52). It is undisputed that a murder occurred and that it was committed in furtherance of a conspiracy to commit robbery; thus, the only matter at issue is whether the murder should have been anticipated. *See Solomon*, 49 S.W.3d at 369. The appellate

court found that there was no evidence that Sample's death was not anticipated or that it should not have been anticipated. *See George*, 2019 WL 5781917, at *6 (citing *Solomon*, 49 S.W.3d at 369). The court stated: "To the contrary, when one decides to steal property from another, he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation." *Id.* (citing *Allen*, 2004 WL 1637885, at *7; *Moore*, 24 S.W.3d at 447). Because Appellant did not meet the second prong of the lesser-included offense test as outlined in *Solomon*, the court concluded that Appellant was not entitled to the requested robbery instruction. *Id.*

Appellant relies on the testimony of Ontiveros and Burden in support of his claim that the appellate court's holding was incorrect because the murder should not have been anticipated. Ontiveros testified that Appellant was "just standing there" trying to calm her down while Range beat Sample. (8 RR 218). Burden testified that she knew that Sample was going to get robbed, that was the "intention," but she did not know he was going to die. (9 RR 163, 165). However, this testimony sheds no light on whether the murder should have been anticipated by Appellant. Burden's belief about the offense is not evidence of Appellant's anticipation of murder, only of hers. Moreover, as correctly noted by the appellate court, whether Appellant or his accomplices intended to kill the victim before the robbery took place is irrelevant if the relevant liability elements were established at the time the crime was committed. *Id.* (citing *Solomon*, 49 S.W.3d at 369; *see also Rousseau*, 855 S.W.2d at 674 (holding there

is no requirement in the case of capital murder committed in the course of a robbery that the intent to cause death be premeditated or formulated prior to the commission of the robbery)).

As outlined by the court in more detail in its sufficiency review, the evidence established the relevant liability elements at the time the murder was committed. *Id.* at *4-5. The trial evidence showed that after Ontiveros and Burden told Appellant they believed Sample had a large amount of cash stored in his hotel room, the three of them conspired to return to Sample's room and rob him. Ontiveros and Burden warned Appellant that Sample was behaving erratically due to his use of illicit drugs, so Appellant recruited his large friend, Range, to assist him in committing the robbery because he anticipated Sample might put up a fight. Appellant and Range brought zip ties with them, indicating their intent to use whatever restraint was necessary to carry out their plan. When Appellant arrived at the hotel for the last time, he parked on the side of the hotel near trees rather than near the taxi stand as he had done previously. Surveillance video showed he had changed clothes in a likely attempt to conceal his identity. He wore gloves and used his elbow to push elevator buttons to not leave his fingerprints. When Appellant and Range entered Sample's hotel room, they turned up the volume on the television to mask any noise. The men hit Sample repeatedly, and after Sample lost consciousness, they bound his wrists and ankles with zip ties and laid him face-down on the bed in a pool of his own blood. After the offense, Appellant did not call the police to report a robbery that had gone farther than

anticipated. Rather, he disconnected the telephone in the hotel room and took Sample's cell phone, hindering his ability to call for help if he regained consciousness. As Appellant was leaving the scene, he tossed Sample's cell phone in a drain near the hotel to conceal the evidence. A few days after the offense, he fled to Las Vegas.

This evidence shows Sample's death was caused by the actions of Appellant and Range in furtherance of the conspiracy to commit robbery. Appellant's actions before, during, and after the offense demonstrate that the murder was or should have been anticipated by Appellant. No evidence showed Appellant did not anticipate the murder. Because the relevant liability elements were established at the time the crime was committed, the testimony of Ontiveros and Burden relied on by Appellant is irrelevant to the resolution of this issue. The appellate court correctly concluded, based on this Court's precedent, that Appellant was not entitled to a jury instruction on robbery. *See Solomon*, 49 S.W.3d at 369.

The cases cited by Appellant are distinguishable.

Appellant argues that, in resolving this issue, the Fifth Court of Appeals ignored cases from two sister courts that recognized murder should not always be anticipated as a potential result of robbery. *See* Appellant's Br. at 8, 11-12, 18-25*; see also Turner v. State*, 01-08-00657-CR, 2010 WL 3062013, at *8 (Tex. App.—Houston [1st Dist.] July 30, 2010, no pet.) (mem. op., not designated for publication); *Tippitt v. State*, 41 S.W.3d 316, 326 (Tex. App.—Fort Worth 2001, no pet.) (abrogated on other grounds by *Hooper v. State*, 214 S.W.3d 9 (Tex. Crim. App. 2007)). The court's opinion

in *Turner* is an unpublished memorandum opinion and therefore has no precedential value. *See* Tex. R. App. P. 47.7 (providing that opinions not designated for publication by the court of appeals have no precedential value); *see also Ferguson v. State*, 335 S.W.3d 676, 688 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (noting that unpublished cases are not part of Texas jurisprudence and cannot be either binding or persuasive authority). In any event, *Turner* and *Tippitt* are both distinguishable.

In *Turner*, also a capital murder case, the evidence showed that the defendant accompanied Brown to a convenience store and was standing outside near the dumpster when Brown approached the store clerk as she was locking up the store, demanded her purse, shot her with a handgun, and took her purse. *Turner*, 2010 WL 3062013, at *7. After seeing Brown shoot the victim, Turner fled the scene. *Id.* In his statement to the police, Turner claimed that he did not know Brown had a gun or that he was going to rob the victim. *Id.* Based on this evidence, the court concluded that the trial court erred by failing to give a jury instruction on the lesser-included offense of robbery. *Id.* at *8-9.

While the court in *Turner* addressed the same issue as is in dispute here, the facts in *Turner* are quite different than the facts in this case. The defendant in *Turner* denied knowledge of Brown's plan to rob the clerk, whereas in this case it is undisputed that there was an agreement among the participants to commit robbery and that they were all acting in furtherance of the conspiracy. In contrast to the defendant in *Turner* who claimed he was merely present when Brown committed the

offense, the evidence in this case showed that Appellant was the mastermind of the offense and that the other participants were acting at his direction. The defendant in *Turner* denied knowledge that Brown brought a weapon, but here it was Appellant who brought the weapon—his large friend, Range—to use during the commission of the offense. And unlike in *Turner*, there was no statement by Appellant admitted at trial outlining his version of events. The court had to rely on Appellant's actions before, during, and after the offense, which in this case demonstrated that the victim's death was or should have been anticipated by Appellant. In *Turner*, some evidence raised the lesser-included offense of robbery; here, none did.

In *Tippitt*, the evidence showed that the defendant formulated a plan with Whitaker to rob a known drug dealer at his house. *Tippitt*, 41 S.W.3d at 319–20, 325. During the course of the robbery, Whitaker pulled out a gun and killed the drug dealer. *Id.* at 320. Once the shooting started, Tippitt fled. *Id.* In his statement to the police, Tippitt claimed he did not know Whitaker had a gun and that he was not in the same room when Whitaker pulled out the gun and fired. *Id.* at 321, 326. The court concluded that the evidence was insufficient to support Tippitt's conviction for capital murder as a co-conspirator because it failed to show that Tippitt should have anticipated that an intentional murder could result from his agreement to aid Whitaker in carrying out the robbery. *Id.* at 324–26.

The issue before the court in *Tippett* was whether the evidence was sufficient to support the conviction for capital murder, not whether the defendant was entitled to a

lesser-included offense instruction. As conceded by Appellant in his brief, this is a "much different question" than the one before this Court. *See* Appellant's Br. at 17. In any event, the defendant in *Tippett* was similarly situated to the one in *Turner* in that his police statement outlining his version of events was admitted at trial, and he denied knowing that his codefendant had a gun when they went to the victim's house to commit the robbery. As previously discussed, it was Appellant in this case who brought a weapon to the offense, and because there was no statement admitted at trial, the court relied upon Appellant's actions before, during, and after the offense to determine that the murder was or should have been anticipated. Because *Turner* and *Tippitt* are both distinguishable, they do not conflict with the Fifth District Court of Appeals' holding in this case. They also provide no support for Appellant's argument.

Because the jury rejected the two intervening lesser offenses included in the charge, any error in the trial court's failure to include the requested instruction was harmless.

Lastly, Appellant argues that a finding of some harm is essentially automatic and this Court should, in the interest of justice, reverse the lower court's holding and remand for a new trial. *See* Appellant's Br. at 12-13. Appellant's claim of automatic harm is unfounded.

The jury charge in this case included instructions on murder and manslaughter, two intervening lesser offenses between the charged offense of capital murder and the requested lesser offense of robbery. (CR 152-53). The jury rejected these lesser offenses and found Appellant guilty of the greater, charged offense. (CR 140, 157; 10

RR 296-97). A jury's failure to find an intervening lesser-included offense may, in appropriate circumstances, render a failure to submit the requested lesser offense harmless. *See Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005); *Saunders v. State*, 913 S.W.2d 564, 572 (Tex. Crim. App. 1995). The harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. *Masterson*, 155 S.W.3d at 171. The intervening lesser offense is an available compromise, giving the jury the ability to hold the wrongdoer accountable without having to find him guilty of the greater, charged offense. *Id.*

Here, the jury's options were not limited to conviction of the greater offense or acquittal. The trial court's inclusion of two intervening lesser offenses gave the jury the ability to hold Appellant accountable without having to find him guilty of capital murder. If the jury believed that Appellant's true intent was to commit robbery and that he acted recklessly in causing Sample's death, not intentionally, manslaughter was a viable option for the jury. Additionally, the jury was informed during voir dire that the mandatory sentence for capital murder is life without parole. (7 RR 93-94, 110, 196-97). They were also informed that murder is a lesser-included offense with a punishment range of five years to life imprisonment, and that manslaughter is a lesser-included offense with a punishment rage of two to twenty years. (7 RR 93-94, 110, 197-99, 201). The jury's rejection of the lesser offenses indicates that the jury

legitimately believed that Appellant was guilty of the greater, charged offense of capital murder and deserved the mandatory punishment of life without parole. *See, e.g., Carson v. State*, 422 S.W.3d 733, 749-50 (Tex. App.—Texarkana 2013, pet. ref'd) (the jury's rejection of intervening lesser offenses, after being informed in voir dire of the mandatory sentence for capital murder and the punishment ranges for lesser offenses, showed its clear and legitimate belief that Carson was guilty of the greater offense, capital murder). Thus, contrary to Appellant's claim, any error in the trial court's failure to include a robbery instruction was harmless, and a new trial is not warranted.

Based on the foregoing, Appellant's sole issue is without merit and should be overruled.

PRAYER

The State respectfully asks that this Court affirm the decision of the Fifth Court of Appeals affirming the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,166 words according to Microsoft Word and complies with the word-count limit in the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.4(i)(2)(B).

/s/ Jaclyn O'Connor Lambert
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served electronically upon Appellant's attorneys, Robert Udashen, rnu@udashenanton.com, and Brett Ordiway, brett@udashenanton.com, Udashen Anton, 2311 Cedar Springs Rd., Suite 250, Dallas, Texas 75201, and upon the Office of the State Prosecuting Attorney, information@spa.texas.gov, P. O. Box 13046, Austin, Texas 78711-3046, on April 24, 2020.

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